

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OSCAR LEE HILLIARD, JR.,

Defendant-Appellant.

UNPUBLISHED

January 18, 2005

No. 252521

Eaton Circuit Court

LC No. 03-020103-FC

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for first-degree criminal sexual conduct with an accomplice, MCL 750.520b(1)(d). Defendant was sentenced to a term of forty-two to sixty-six months' imprisonment for the conviction. We affirm.

On the evening of July 5, 2002, Amanda Scofield went to place some job applications and had some drinks at two bars, Reno's and then the Green Door. Scofield testified that after a few drinks of a rum and coke at the Green Door she only has one brief memory of being in a truck and that when she woke up in the morning Clark Hulliberger had his finger inserted in her vagina. Scofield left Hulliberger's home and went to the hospital indicating that she thought that she had been raped. An investigation led to Hulliberger and defendant. The investigation revealed that defendant had sexual intercourse with Scofield in Hulliberger's bed and had left prior to when Hulliberger assaulted Scofield. Hulliberger had went in to wake Scofield when he inserted his finger into her vagina.

Hulliberger plead guilty to second-degree criminal sexual conduct.¹ There was no dispute that defendant sexually penetrated Scofield. The prosecution's contention was that Hulliberger was defendant's accomplice and that when defendant had sexual intercourse with Scofield she was physically helpless, unconscious, asleep, or physically unable to communicate and did not want to participate, and that defendant knew or should have known she was in one of

¹ Hulliberger was charged with first-degree criminal sexual conduct and entered a plea agreement to the reduced charge of second-degree criminal sexual conduct and agreed to testify for the prosecution against defendant.

these states. Defendant's contention was that the sexual intercourse with Scofield was consensual.

Defendant's sole issue on appeal is that reversal is required because the trial court erred and violated his right to present a defense in denying his attempts to present evidence showing Scofield's prior drinking history, which was admissible under MRE 703 as evidence that defendant's expert based his opinion on. We agree that the trial court erred, but find no error requiring reversal.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). A trial court's misidentification of the ground for the admission of evidence does not necessarily require reversal. *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992). "An error in the admission or the exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); MCL 769.26. Under this rule, reversal is required only if the error is prejudicial. *People v Mateo*, 453 Mich 203, 212 n 10; 551 NW2d 891 (1996)." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Thus, an evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative in light of the weight of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001); *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

Dr. Charles Simpson, an expert of Neuropsychopharmacology (the study of mind or mood altering drugs), was called out of order to testify for the defense due to scheduling problems. Dr. Simpson testified that a person's tolerance is significant to determine how they are affected by alcohol, and that a heavy drinker would have a higher tolerance. Dr. Simpson further testified that a blackout is a significant memory loss. Dr. Simpson opined that an experienced drinker may experience a blackout with approximately a .25 blood alcohol content (BAC) while an inexperienced drinker may experience a blackout with approximately a .14 or .15 BAC. Dr. Douglas Segal, with St. Lawrence Hospital, testified that Scofield had a BAC of .06 just before noon on July 6, 2002, and that based on averages her BAC might have been around .24 on July 5, 2002, assuming she stopped drinking around 11:00 p.m. According to Dr. Simpson, at .24 an experienced drinker would show signs of intoxication but could exhibit fairly normal behavior. Dr. Segal also acknowledged that some people can function with a BAC of .24. Dr. Simpson testified that decisions can be made in blackout and are made all of the time because people are often still functioning and answering. Based on defense calculations of Scofield's height, weight, and how much she had to drink and during what time periods, Dr. Simpson calculated that Scofield's BAC could have been between .233 and .268 at midnight if she had no drinks from 10:30 to midnight, and that if she had a drink between 10:30 and midnight her BAC at midnight might have been between .281 and .308. Using another calculation, Dr. Simpson determined that Scofield's BAC at midnight could have been between .202 and .271. Dr. Simpson opined that a highly tolerant person could still be functioning at the levels discussed above and there would likely, at least, be a partial blackout, but the individual

could still make choices even if in and out of consciousness. Dr. Simpson claimed that if he knew Scofield's average consumption pattern, how often and how much she drank, he could form an opinion on how she would potentially be behaving.

The prosecution objected to testimony regarding Scofield's drinking history being admitted and contended that the evidence of Scofield's consumption pattern would be inadmissible bad acts evidence under MRE 404(b). Defendant contended that he was trying to show tolerance and that the trial court could admit the evidence under MRE 703. The trial court declined to admit the evidence under MRE 404(b). The trial court indicated that there was evidence to support that Scofield had a high tolerance for alcohol as defendant could argue tolerance based on how much she drank at Reno's and the fact she was still functioning and walking at the Green Door. Defendant made an offer of proof that testimony would have been provided from Sarah Mellem, Scofield's friend and roommate, and Shawn Goerbig, her former boyfriend, with regard to Scofield's consumption and tolerance for alcohol and Vicodin. Further, defendant offered that Goerbig would testify that Scofield has had blackouts in the past when she was drinking. The trial court continued with its finding that the drinking history and tolerance evidence should be limited to the night in question because of MRE 404(b).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Bad acts evidence does not violate MRE 404(b) unless it is offered solely to show the propensity of an individual to establish that she acted in conformity therewith. *People v Vander Vliet*, 444 Mich 52, 65; 508 NW2d 114 (1993) modified 445 Mich 1205 (1994). Defendant contends that the evidence of Scofield's prior drinking was relevant to her tolerance, and admissible for that purpose; not to show she acted in conformity with her prior behavior. According to defendant this evidence was presented only to show the factual basis for his expert's testimony under MRE 703. We agree with defendant that the evidence was offered for a purpose other than to show actions in conformity with prior drinking because there was no dispute with regard to whether Scofield was drinking. Evidence of defendant's tolerance was relevant to defendant's defense, MRE 401,² and was part of the foundation for defendant's expert's testimony, MRE 703. Defendant offered the evidence to show Scofield had the tolerance of an experienced drinker so that his expert could opine that she had tolerance that would allow her to function in a blackout state. The trial court seemingly did not recognize that the evidence was offered for a proper

² The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted govern relevance and materiality. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996); *People v Kevorkian*, 248 Mich App 373, 442; 639 NW2d 291 (2001).

purpose, thus, did not analyze whether the testimony should have been admitted as the basis of Dr. Simpson's testimony under MRE 703.

MRE 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence hereafter.

Basically, MRE 703 (as amended on September 1, 2003), limits the facts or data upon which an expert can testify to the personal knowledge of the expert and facts that are admissible at trial. See, generally, Dubin & Weissenberger, *Michigan Evidence: 2004 Courtroom Manual*, pp 263-264. Scofield's alcohol use was an underlying fact behind the expert's opinions. Although, evidence on which an expert bases an opinion or inference shall be in evidence, MRE 703, the evidence on which an expert bases his opinion is not automatically admissible. Considerations of unfair prejudice under MRE 403 may preclude the disclosure of the facts underlying an expert's opinion. *People v Robinson*, 417 Mich 661, 664-665; 340 NW2d 631 (1983); *People v Caulley*, 197 Mich App 177, 194-195; 494 NW2d 853 (1992); *People v Furman*, 158 Mich App 302, 326-327; 404 NW2d 246 (1987); see also *People v Pickens*, 446 Mich 298, 334-336; 521 NW2d 797 (1994). But it is not entirely clear that the trial court applied the MRE 403 standard.

Because it appears that the trial court denied the testimony solely because it considered the evidence MRE 404(b) bad act evidence, we find that it abused its discretion in limiting the admission of evidence regarding Scofield's drinking history without finding that it should be limited under MRE 403.³ Nonetheless, we find that it does not affirmatively appear that it is more probable than not that any error was outcome determinative. See *Whittaker*, *supra* at 426-427; *Smith*, *supra* at 680.

Defendant contends that testimony regarding Scofield's history of drinking and using should have been admitted as evidence of Scofield's tolerance because his expert's testimony was based on evidence of Scofield's tolerance.⁴ Dr. Simpson did testify that if Scofield has no

³ We note that the trial court should have recognized that the bad acts evidence was being offered for a proper purpose and then determined whether its admission should be limited under MRE 403. See *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

⁴ Any issue with regard to Scofield's history of Vicodin use is not properly preserved as defendant failed to present the issue in his statement of questions presented. *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nonetheless, any contention with regard to Vicodin is without merit as Scofield acknowledged that she was addicted and had an increased tolerance to Vicodin. The trial court allowed defense counsel to attempt to establish that Scofield had an addiction to Vicodin on July 5 or 6, 2002. Scofield had been prescribed Vicodin. And, Scofield acknowledged that she was addicted to Vicodin around July 5 and 6, 2002, but claimed that the last time she had any was "probably" on July 2, 2002. Scofield further acknowledged that she had a high tolerance for Vicodin. Dr. Charles Simpson testified that a person with an addiction to Vicodin would have a high tolerance. A narcotic was found in Scofield's system when she was tested on July 6, 2002, which likely was from Vicodin. Dr.

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memory of her interaction with defendant, and that interaction with defendant occurred, she was in a blackout. Basically, Dr. Simpson testified that Scofield, whose BAC was between .202 and .308, was having a blackout because she does not remember any interaction with defendant, when there was clearly interaction at the Green Door and after. Further, even though the trial court limited the admitted testimony regarding history of Scofield's drinking, it admitted adequate evidence to provide context to the expert's opinion. Evidence admitted under MRE 703 is admitted for the limited purpose of providing context to the expert's opinion, "thereby enabling the trier of fact to determine the weight due an expert's opinion." *Pickens, supra* at 335. The trial court allowed sufficient evidence to support the opinion of defendant's expert, but only limited this tolerance evidence to that which was most relevant; that of the evening in question. We further note that there was not much dispute with regard to Scofield's tolerance or that it is possible for someone with her tolerance to have a blackout and still function during this blackout. The prosecution's contention was that Scofield, on this occasion, was helpless to the point she could not function and communicate.

There was sufficient evidence on the record to support that Scofield had the type of tolerance that allowed her to function after a significant amount of alcohol and that she could experience a blackout, which provides context to the opinion of Dr. Simpson that she was in a blackout during interaction with defendant. With regard to alcohol tolerance, Scofield testified that normally two twenty-ounce beers and a shot would not affect her or give her a "buzz." Seemingly, this supports defendant's contention that Scofield was an experienced drinker. Scofield also testified that she drank two or three times a month prior to the incident. Scofield further testified that she was not an experienced drinker to the point of memory impairment. But, after defense counsel pointed to some of her preliminary examination testimony, Scofield acknowledged that she had some memory loss from drinking when she was younger.

On the night in question, Scofield acknowledged that she had consumed two twenty-ounce beers and some shots of tequila (two or three) at Reno's. Terry Dormer testified that Scofield may have had three twenty-ounce beers, and some shots. Michael Isenhath testified that after this drinking Scofield could still play pool. Scott Becker added that after the drinks at Reno's, Scofield did not appear to be drunk and was not stumbling. Scofield drove her vehicle from Reno's to the Green Door. Scofield testified that when she went to the Green Door she had a "buzz," but was not drunk. Scofield claimed that at the Green Door she had part of one rum and coke and could remember nothing after that. Dormer testified that, when he left the Green Door, Scofield looked "pretty drunk," so he told the bouncer to keep an eye on her. Scofield was cutoff from being served alcohol. Eric Kelly, the doorman at the Green Door, testified that Scofield was out of control and thought she should be cutoff and that something else besides alcohol may have been in her system. But Kelly testified that Scofield was "functioning pretty decent," could walk, and her motor skills were good. Kelly further testified that Scofield was all over the bar trying to get guys to buy drinks for her. Jennifer Costigan testified that Scofield was acting erratic and may have been under the influence of more than alcohol. Scofield left the Green Door with defendant and Hulliberger. Hulliberger testified that, at this time, Scofield was

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Simpson testified that for the Vicodin to be in Scofield's system she would have needed to ingest within forty-eight hours, but acknowledged that other experts say seventy-two hours.

very intoxicated and was in and out of consciousness. Defendant testified that, when he and Scofield left the Green Door, she was walking, wanted to spend the night, and that they were kissing. Defendant acknowledged that Scofield “nodded out” in the truck, but claimed that she awoke when they arrived at Hulliberger’s home. Defendant testified that Scofield walked upstairs to the bedroom. Defendant further testified that he went upstairs and Scofield asked him to go get her a beer, and that when he returned she was lying on the bed naked. Defendant claimed that he and Scofield started kissing again and that she rolled over and they had sexual intercourse. According to defendant, Scofield was an active participant, but fell asleep after climaxing. Defendant claims he then quit and got dressed.

The above testimony clearly provided the context for the testimony of Dr. Simpson, and did not prevent defendant from presenting his defense; as defense counsel’s closing argument clearly ties Scofield’s behavior as only being consistent with Dr. Simpson’s testimony regarding blackouts and functioning. During closing argument defense counsel contended that: (1) it was unrefuted that a blackout is a memory loss, and that blackout does not mean Scofield was physically helpless as she could still communicate; (2) Scofield had an addiction to Vicodin and drank frequently when underage and admitted to a prior blackout; (3) Scofield’s tolerance was clearly high as evidenced by the amount of alcohol she consumed the evening of July 5, 2002, and the fact that she was still functioning, (4) it is not disputed that Scofield had a high tolerance; (5) Scofield may have drifted in and out of consciousness, but it is unrefuted and the science supports that when she comes into consciousness she can still be active and consent to sexual intercourse; (6) Scofield experienced disinhibition and increased sex urge from the alcohol in that she may have made decisions she normally would not make; and (7) Scofield’s behavior was consistent with Dr. Simpson’s testimony and defendant’s testimony supporting that she consented and was an active participant. We find that there was evidence in the record to adequately support the defense.

Defendant has not demonstrated that it more probable than not that any error affected the outcome of the trial in light of the weight of the properly admitted evidence. The testimony of Scofield’s roommate and a former boyfriend regarding her drinking to support tolerance was not that significant because Scofield herself acknowledged that she had a high tolerance for alcohol. Scofield acknowledged during her testimony that normally forty ounces of beer and a shot of tequila would not affect her or her walking.⁵ She further acknowledged that she had blackouts in the past. The trial court also allowed the most relevant testimony with regard to Scofield’s tolerance on July 5, 2002, which has evidence of how much alcohol she consumed that night and how she was functioning. And, the testimony regarding the night in question supported that Scofield had a high tolerance. Defendant’s expert provided testimony regarding blackouts and estimation as to Scofield’s BAC. And, defendant’s expert opined that if the interaction occurred and Scofield has no memory, she was in blackout; thus, testifying that she was in a blackout from the time she claims no memory, from the time when she was drinking the rum and coke.⁶

⁵ Scofield testified that this was the amount of alcohol drinks she had on the night in question and was still functioning with a BAC that was between .202 and .308.

⁶ In defendant’s brief on appeal, he indicates that the only purpose for the proposed evidence was to provide a factual basis for Dr. Simpson to conclude that Scofield was an experienced enough
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The testimony discussed above clearly provides the context for Dr. Simpson's expert opinion, MRE 703, and as noted in defense counsel's closing argument the testimony of Dr. Simpson was in large part unrefuted. Dr. Simpson basically testified that Scofield was in a blackout from the point she remembers nothing. Defense counsel tied the evidence and the expert testimony together in his closing argument.

Based on the above discussion, we find that an any error was harmless and does not require reversal because it does not affirmatively appear that it is more probable than not that the error was outcome determinative.

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

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drinker to reach the BAC's predicted for her and that she could retain consciousness and make decisions, and have a blackout. Dr. Simpson did testify that Scofield was in a blackout, which makes the proposed evidence even less significant.